United States Court of Appeals
for the Ninth Circuit

PERRY E. BURNHAM and L. EARL BURNHAM,
Defendants and Appellants,

vs.

J. HAROLD ABEGGLEN,
Plaintiff and Appellee.

No. 12648

BRIEF OF APPELLEE

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12 CJS 185 ,Note 26.

Note, 169 ALR 611.

Note, 51 ALR 1392.

12 CJS 200.

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

Some qualification of the statement of facts contained in appellants' brief is deemed necessary.

There is some confusion with reference to when the addition to the broker's contract was made. It was signed April 29, 1948, by the appellants, and the modification of the terms of payment of appellee's commission was made either May 12th or May 15th, 1948, at the Boise Hotel. (Tr. 8, 79, 102).

The statement appears at page 5 of appellants'

brief that the inspection of the Randall ranches was made prior to the signing of the agency agreement. The record shows that the agency agreement was made April 29th, 1948, prior to the inspection. The addenda to the agreement was made either on May 12th or May 15th, 1948, after inspection.

Contrary to appellants' statement, at page 5 of the brief, that appellee represented the Randall ranches to be of the value of $70,000.00, he in fact stated that they had a $70,000.00 equity therein. (Tr. 201).

Further, appellee did not represent the three Randall farms to be owned outright by the Randalls, as set out at page 5 of the brief. As a matter of fact, the record shows that appellants were aware that two of the Randall ranches had prior liens against them, and that Carl Randall was buying his ranch on contract. (Tr. 84-85, 192-193, 196, 199-200.) Again, contrary to the statement at page 5 of appellants' brief, that appellee represented Carl Randall's equity to be $40,000.00, the facts are that this was the total value of the real estate, growing crops and beet equipment, without deducting the contract balance due of $15,000. (Tr. 77, 119, 193). The equity in Carl Randall's ranch was therefore approximately $25,000.

Appellants show that Carl Randall received $5000.00 for his equity in his ranch, their brief at

page 5; however, it is apparent that this is not a correct indication of the true worth of his equity. Randall was forced to sell it at an upset price, which did not reflect the true value. (Tr. 120-121.)

At page 6 of appellants' brief, the statement appears that Carl Randall "abandoned the premises" (referring to the Cove Ranch), and that the premises were left unoccupied during the winter of 1948 and 1949; that for want of care or removing snow from the roof the buildings collapsed. The record (Tr. 90-91, 98) discloses the Randalls did not intend to, nor did they, abandon the Cove Ranch, but on the contrary they were going to return in the spring and had made plans so to do. The cattle were moved for the winter to lower country, (Tr. 121), and as a matter of fact each of the Randalls had leased their other farms so that they would be in a position to work the Cove Ranch, commencing in the spring of 1949. (Tr. 95-96, 101, 111, 124). The Randalls arranged for a caretaker to watch the ranch during the winter season. (Tr. 99, 121, 191). Further, an unusually severe snow storm with a fall of 26 inches in depth, caused the collapse of the roofs which were not well constructed, considering the weather conditions in the country. (Tr. 191-192).

While appellants' statement of the case is extremely brief, considering the involved factual situation, it is not thought essential to further develop the facts.

POINTS OF LAW AND SUMMARY OF ARGUMENT

I

THE TRIAL COURT, AFTER A FULL PRESENTATION OF THE CASE FOR BOTH SIDES, RESOLVED THE ISSUES AGAINST THE APPELLANTS. THE FINDINGS OF THE TRIAL COURT AND ITS JUDGMENT ARE PRESUMPTIVELY CORRECT. IF THE FINDINGS AND JUDGMENT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, THE JUDGMENT WILL BE AFFIRMED.

II

WHERE A REAL ESTATE BROKER HAS PRODUCED A PURCHASER, READY, WILLING AND ABLE TO BUY, ON THE TERMS PROPOSED BY THE SELLER, THE BROKER HAS PERFORMED HIS PART OF THE AGREEMENT AND IS ENTITLED TO PAYMENT OF THE COMMISSION, AS AGREED UPON BETWEEN THE PARTIES. IN THE ABSENCE OF AGREEMENT TO THE CONTRARY, UPON EXECUTION OF THE SALE AND PURCHASE AGREEMENT BETWEEN BUYER AND SELLER, THE BROKER IS ENTITLED TO HIS AGREED COMMISSION.

III

APPELLANTS HAVE COMPLETELY FAILED TO ESTABLISH "CLEAR AND CONVINCING" FRAUD OR MISREPRESENTATION ON THE PART OF APPELLEE. FURTHER APPELLANTS' SUBSEQUENT RECOGNITION AND MODIFICATION OF THE SALES CONTRACT, AFTER DISCOVERY OF THE ALLEGED MISREPRESENTATION OR MISUNDERSTANDING, ESTOPS THEM FROM ASSERTING FRAUD AS A DEFENSE.

IV

WHEN APPELLANTS VOLUNTARILY ENTERED INTO AN AGREEMENT WITH THE PURCHASERS, SUBSEQUENT TO THE EXECUTION OF A BONA FIDE SALE AND PURCHASE CONTRACT, WHEREBY THE CONTRACT WAS RESCINDED — THE RIGHTS OF THE PARTIES COMPROMISED — AND MUTUAL RELEASES GIVEN — ALL WITHOUT THE CONSENT, ACQUIESCENSE OR APPROVAL OF THE APPELLEE, HE WAS THEN IMMEDIATELY ENTITLED TO HIS FULL BROKER'S COMMISSION.

ARGUMENT

I

THE TRIAL COURT, AFTER A FULL PRE-

SENTATION OF THE CASE FOR BOTH SIDES, RESOLVED THE ISSUES AGAINST THE APPELLANTS. THE FINDINGS OF THE TRIAL COURT AND ITS JUDGMENT ARE PRESUMPTIVELY CORRECT. IF THE FINDINGS AND JUDGMENT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, THE JUDGMENT WILL BE AFFIRMED.

The record in this case is replete with numerous instances of conflicting testimony with respect to the most important issue in the case—the question of whether or not the Burnhams had knowledge of the prior liens on the Randall ranches, and the fact that Carl Randall did not have title to his ranch, but rather was purchasing it under a contract.

The trial court, unlike this court, had the opportunity of hearing the testimony of the various witnesses, and of observing their demeanor while on the witness stand. After a full hearing and thorough study, the court resolved the conflicts of the evidence in favor of the appellee.

This court can not lightly set aside the judgment of the trial court upon these issues.

In Mendez vs. Mendez, 176 Fed 2d 849, the court stated at page 851:

> "This action was tried without a jury, and due regard shall be given to the opportunity of the trial court to judge the credibility of

the witnesses."

Also, in Maloy vs. New York Life Insurance Co., 103 Fed. 2d, 439, it was said:

> " * * * and where the credibility of witnesses is a determinative factor in arriving at the findings of fact, as was the case here, the reviewing court will not usually upset those findings made by the judge who had the opportunity of seeing and hearing the witnesses testify. (Citations)"

In Maiatico v. Holden, 153 Fed. 2d, 654, the court in affirming a judgment for the plaintiff, and after referring to the fact that the court heard or observed the witnesses, stated:

> "The testimony as a whole, including that just referred to, is confused. The findings of fact of the trial judge are in some detail. On this state of a record, we will not disturb the conclusion of the court unless we find clear error."

As authority for the proposition that the findings of Judge Clark and his judgment based thereon, are presumptively correct, reference is made to the case of Federal Savings and Loan Insurance Corporation vs. First National Bank, 164 Fed. 2nd 929, where at page 932, we find the following quotation:

> "Certainly, if the findings of the court are sustained, by substantial evidence, the judg-

ment appealed from should be affirmed. These findings are presumptively correct and must be sustained unless clearly erroneous." Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723 c; (Citations).

We are not at liberty to substitute our judgment for that of the trial court and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence they should be sustained."

II

WHERE A REAL ESTATE BROKER HAS PRODUCED A PURCHASER, READY, WILLING AND ABLE TO BUY, ON THE TERMS PROPOSED BY THE SELLER, THE BROKER HAS PERFORMED HIS PART OF THE AGREEMENT AND IS ENTITLED TO PAYMENT OF THE COMMISSION, AS AGREED UPON BETWEEN THE PARTIES. IN THE ABSENCE OF AGREEMENT TO THE CONTRARY, UPON EXECUTION OF THE SALE AND PURCHASE AGREEMENT BETWEEN BUYER AND SELLER, THE BROKER IS ENTITLED TO HIS AGREED COMMISSION.

Prior to a consideration of the basic rules govern-

ing the recovery of commissions by real estate brokers, it would be well to develop the extent of appellee's efforts in putting buyer and seller together in this instance. Mr. Abegglen, prior to making a contract with the Randalls took a number of prospects to the Cove Ranch, and went over the ranch in great detail with Mr. Layton. (Tr. 52). After the Randalls became interested he corresponded with them and visited their ranches at Eden, Parma, and New Plymouth, Idaho. He visited the Eden ranch "a half-dozen times before the sale was consummated," the New Plymouth ranch three times, and the Parma ranch twice, besides trips to Twin Falls and to Boise. (Tr. 76-77). The evidence discloses that appellee participated in the inspection of the ranches with appellants, and in the discussions and meetings leading up to the execution of the sales contract. It can be stated unqualifiedly that the appellee was the procuring cause in putting buyer and seller together under the sales contract dated May 15, 1948.

The general rule of law applicable to this situation is clear cut. In order for a real estate broker to be entitled to his commission for the sale of land he must produce a purchaser who is able, ready and willing to buy the lands on the terms proposed by the seller or agreed to by him. A clear statement of this principal is found in Down vs. DeGroot, 256 Pac. 438, where at page 439 we find the following:

"The rule with reference to the liability of one who in writing agrees to pay a broker a commission for the sale of real property is almost universally understood to be that when the broker has produced a purchaser ready, able, and willing to buy on the terms proposed by the seller, the broker has performed his part of the contract and is entitled to the payment to him of the commission as agreed upon by the parties."

This rule has been recognized in Idaho as appears from the following cases:

Phillips vs. Brown, 21 Idaho 62, 120 Pac. 454;

Deal and Hawley vs. Scrivner, 66 Idaho 99, 155 Pac. 2d 920.

The latter case cites several additional Idaho cases, including that of Thomas vs. Young, 42 Idaho 240; 245 Pac. 75, the court stating at page 244:

"However, before plaintiffs are entitled to recover the commissions claimed for finding a purchaser, they must either obtain a contract from a proposed purchaser able to buy, whereby he is legally bound to buy on the authorized terms *or they must produce to the principal a proposed purchaser who is able, willing and ready to buy upon the terms authorized.*" (Emphasis ours).

A case quite similar to that here argued is Simmons vs. Libbey, 208 Pac. 2d 1070. In that case, the purchaser expected to sell some Colorado property and use the proceeds for meeting a contract obligation. The sale did not materialize and he was unable to comply with his sales agreement. The court pointed out that the fact of knowledge on the part of both the parties to the sales contract, that the purchaser's ability to pay the contract price depended upon the sale of the Colorado property,

> "No more defeated the defendant's right to his commission than if the condition had rested upon his ability to borrow the money. This was a chance the seller chose to take. In doing so, he did not therefore expose the broker's right to a commission, to the same hazard. When the owner accepted the prospect produced by defendant as a purchaser, the broker's right to a commission became fixed. (Citation)."

The court also reiterated the general principle heretofore expressed. A striking parallel is to be drawn between the Simmons case and the case at bar. Here the Randalls were disappointed in not being able to dispose of their respective ranches as advantageously as expected. The Burnhams had full knowledge of this situation, and this cannot operate to deprive appellee of his right to the agreed commission.

There appears to be a unanimity in courts holding that a real estate broker is entitled to his commission upon the execution of a sales and purchase agreement between owner and purchaser, in the absence of stipulation or agreement to the contrary.

When the appellants and the Randalls executed the sales contract, dated May 15, 1948, the former unqualifiedly acceeded to the revised terms of sale. Their original proposition stipulated a $25,000.00 cash down payment. At the time of the signing of the contract of May 12th or May 15th, the appellants had had ample opportunity to inspect and had inspected the security tendered by the Randalls. The signing of the contract by appellants was a clear indication that they were satisfied with the ability of the purchaser to meet the terms of payment, as agreed upon, and the appellants were satisfied with the ability and willingness of the purchasers to meet the payments, as they matured.

In support of this we refer to the case of Lockett vs. Drake, 31 Pac. 2d 499, where after a broker was employed to sell real property, a contract was drafted and signed by the owner and purchaser. The court said:

> "It is the almost universally accepted rule of law that, in the absence of a specific contract to the contrary when a real estate broker has brought together the parties to a sale or exchange of real estate, and they have

agreed fully on the terms and entered into a binding contract for such sale or exchange, his duties are at an end and his commission is fully earned, and it is immaterial that the parties to the contract rescind mutually or that one or the other thereof defaults and the sale or exchange is not fully affected. (Citations)".

The court concludes its opinion with the observation that it is unfortunate that the owner is compelled to pay a commission when the broker's services did not produce the anticipated results, but since the owner accepted the proposition, the broker could not be denied his commission. In a later decision the same court following this rule in Eason vs. Heighton, 65 Pac. 2d 1373.

Reiterating the rule are the following authorities:

Myers vs. Selggio, 181 Pac. 2d 690;

Ralston vs. Demirjian, 194 Pac. 2d 41;

McNamara v. Steckman, 202 Cal. 569; 262 Pac. 297;

Collopy vs. Stevenson, 265 Pac. 1098.

Moore vs. Irwin, 116 SW 662;

Keinath vs. Reed, 137 Pac. 841;

Deeble vs. Stearns, 186 Pac. 2d 173;

Note, 169 ALR 611; 12 CJS 185, Note 26; Note, 51 ALR 1392.

Applying the foregoing authorities to the facts of this case, it is clear that appellee is entitled to his commission unless fraud and misrepresentation have been established.

III

APPELLANTS HAVE COMPLETELY FAILED TO ESTABLISH "CLEAR AND CONVINCING" FRAUD OR MISREPRESENTATION ON THE PART OF APPELLEE. FURTHER APPELLANTS' SUBSEQUENT RECOGNITION AND MODIFICATION OF THE SALES CONTRACT AFTER DISCOVERY OF THE ALLEGED MISREPRESENTATION OR MISUNDERSTANDING, ESTOPS THEM FROM ASSERTING FRAUD AS A DEFENSE.

The appellants in their brief have stated that the appellee grossly misrepresented the value of the Randall ranches, and concealed from them the fact that Carl Randall did not have title to his ranch, the inference being, of course, that had appellants known of these facts that they would never have entered into the sales contract with the Randalls.

We think that a careful reading of the record in this case will completely refute appellants' argument. In the first place, it is not even argued that Carl Randall, although only a purchaser of a ranch

under contract, did not have a mortgageable interest in said property. The rule is clearly established in Idaho that a contract purchaser of real estate has an interest therein which may be transferred, and hence may be mortgaged.

> Perkins vs. Bundy, 42 Idaho 560; 247 Pac. 751.
>
> Further, Section 45-1001 of the Idaho Code provides that "Any interest in real property, which is capable of being transferred, may be mortgaged."

Further, the contract of sale between the appellants and the Randalls (Exhibit 3) provides only that the Randalls would give mortgages upon the described real estate, and it was not stipulated therein that the mortgages should be first mortgages.

In any event, there is a definite conflict in the evidence as to whether or not appellee informed appellants that the title to the ranches were clear.

> Perry Burnham stated:
>
> "Mr. Abegglen said that they had from $75,000 to $90,000 in their property, in valuation in the clear." (Tr. 138).
>
> On the other side of the conversation, Mr. Abegglen's states that he told the Burnhams that the three Randalls had in their ranch "$70,000 equity; I didn't stipulate that they were clear." (Tr. 201).

The latter statement of the value took into consideration the fact that there were mortgages on the property. (Tr. 201).

Edward Randall testified that he informed Mr. Skeen, the Burnham's attorney, that there was a lien against his ranch. (Tr. 110).

Jack Layton confirmed this. (Tr. 190), and Perry Burnham also knew of this lien. (Tr. 145). The net value of Edward Randall's ranch and equipment was $21,140.60.

It is clear from not only the testimony of Orel Randall (Tr. 94, 199), but also from the admission of Perry Burnham, that appellants had knowledge of a first lien on Orel Randall's ranch. (Tr. 144). The evidence disclosed Orel Randall's security to be at least $33,000.00. Carl Randall testified that the situation relative to his title was discussed with Burnham while at the meeting. (Tr. 118). This is again substantiated by Jack Layton. (Tr. 190). It is significant that Perry Burnham recalled that two of the Randall ranches were encumbered, and that he had knowledge of this prior to the execution of the contract of sale. However, appellants' attorney, who drafted all of the documents, and who participated in the Boise Hotel meeting, stated on the witness stand:

> "So far as I knew from anything that was said there the title was clear in Carl Randall and Ed Randall, there was no mention of

mortgages made with respect to either of those ranches." (Tr. 155).

Granted that the testimony of interested parties perhaps can be discounted, but surely the testimony of disinterested witnesses, who had no axe to grind, substantiates appellee's position that appellants had full knowledge of the condition of the titles to the Randall properties. Obviously this was the conclusion of the trial court.

Totalling the equities in the respective Randall ranches, the infomation about which appellants had full knowledge at the Boise Hotel conference, we find it amounts to approximately $71,149.60. This justifies completely appellee's representation to appellants that the Randalls had an equity in their property of around $70,000.00. This figure even dovetails with the testimony of Perry Burnham, wherein he stated that appellee represented to him the equity to be between $75,000.00 and $90,000.00.

Perhaps the most important issue in this case is the question of fraud. Appellants have made an extremely serious charge which should not be lightly made or found. It is an elementary principle that the party making the charge of fraud or misrepresentation must prove the same by clear and convincing evidence.

Hill vs. Wilkinson, 60 Idaho 243, 90 Pac. 2d 696;

Farmers Exchange vs. Calkins, 103 Pac. 2d 230.

A recent Idaho case, Nelson vs. Hoff, decided May 10, 1950, and reported at 218 Pac. 2d 345, contains the following statement:

> "Fraud will not be presumed and appellants have the burden of establishing all the elements of fraud alleged by clear and convincing evidence. (Citations).
>
> * * * It would unduly lengthen this opinion to discuss the evidence upon which the court based such findings; suffice it to say that a careful examination of the evidence discloses that each of the court's findings in this respect is based upon substantial, competent although conflicting, evidence. This court has frequently and uniformly held that findings of fact supported by competent, substantial, although conflicting evidence, will not be disturbed on appeal. (Citations.)"

In concluding this point, we submit that there is ample evidence to support the determination by the trial court that the appellants had full knowledge of not only the values of the Randalls' equities, but also as to the condition of their respective titles, and that there was a complete absence of fraud or misrepresentation on the part of appellee.

IV

WHEN APPELLANTS VOLUNTARILY ENTERED INTO AN AGREEMENT WITH THE PURCHASERS, SUBSEQUENT TO THE EXECUTION OF A BONA FIDE SALE AND PURCHASE CONTRACT, WHEREBY THE CONTRACT WAS RESCINDED — THE RIGHTS OF THE PARTIES COMPROMISED — AND MUTUAL RELEASES GIVEN — ALL WITHOUT THE CONSENT, ACQUIESCENSE OR APPROVAL OF THE APPELLEE, HE WAS THEN IMMEDIATELY ENTITLED TO HIS FULL BROKER'S COMMISSION.

To briefly summarize the facts pertinent to this section of the brief, after the first contract of sale was formally drawn and signed, approximately 90 days later a modified contract between the Burnhams and the Randalls was agreed upon and executed, which cleared up some of the difficulties and objections which had developed since the drafting of the original contract. Thus it is clear that the terms of the sale were then satisfactory to the sellers, who had had ample opportunity to ascertain all of the facts. The Randalls had already entered upon the Cove Ranch under their contract, and were engaged in farming operations, and had done considerable improvement work on the property. Substantial payments in cash and in kind had been made to the Burnhams. In April, 1949, a confer-

ence was called at Twin Falls, Idaho, between the Burnhams and the Randalls. There is a conflict in the testimony as to just which party called this conference. The Randalls thought the Burnhams had requested it, and Mr. Burnham testified that he came to the conference at the request of a Mr. Baldwin,—Mr. Baldwin, of course, being a real estate broker who had lined up a third party to purchase if the Randalls were out of the picture. At this time it is clear that there was no default under the contract of sale—neither the first year's installments on principal or interest having yet become due.

Appellants had declared no forfeiture, and of course, had no right to forfeit out the Randalls. Out of this meeting in Twin Falls there came a mutual rescission of the contract to purchase, the Randalls giving the Burnhams a quitclaim deed, and the Burnhams agreeing to release the mortgages and cancel all notes upon the payment by the Randalls within one year of the sum of $6000.00, together with interest at 6 per cent. *Apellee was not a party to this compromise and settlement, nor did he acquiesce or agree to any of the terms of the settlement.*

It is apparent that the Burnhams voluntarily participated in this compromise settlement without the consent or approval of the appellee. They alone were responsible for bringing about a situation where the

contract of sale was of no further force nor effect. The record shows that the Randalls, although somewhat reluctant to continue on, were in a position so to do—certainly they were legally obligated, had the Burnhams insisted upon their living up to the contract terms.

The weight of authority stands behind the proposition that a broker is entitled immediately to his commission, even though it be on a pro-rata or installment basis, where he had put the buyer and seller together, a contract has been executed, and subsequently, without the broker's consent or approval there is a rescission of the contract.

The general rule is stated in the case of Tarbell vs. Bomes, 135 Atlantic 604. In this case a broker was employed to sell real estate, his commission to be paid upon the delivery of the deed and payment of the consideration. The broker procured a purchaser and a binding contract of sale was entered into upon an installment purchase basis. Later the purchaser, after negotiations, but without the consent of the broker, entered into a compromise with the seller, and the purchaser was released from the contract obligation. The broker was successful in his suit for the full commission.

In the language of the court:

"The test by which to determine the broker's right to commission when conditional upon the complete carrying out of the

contract, is whether the seller used due diligence and reasonable efforts to secure performance of the contract of sale. * * * Release of a seller's rights to a legally bound buyer is not permissible at the expense of the broker who has brought the parties together and done all that he could to help the seller secure performance."

A further statement in this case:

"We have found no case where, after a valid contract of sale, a seller has released the buyer on account of sympathy, generosity, or unwillingness to enter upon litigation which could be prosecuted to a successful conclusion and by such release has prevented the broker from recovering a commission." Emphasis ours).

Rather than prolong this brief unduly, we cite the court to the following cases — ample authority to back up this rule—

Ratzlaff vs. Trainor-Desmond Co., 183 Pac. 269;

Kendrick vs. Speck, 67 Fed. 2d 295;

Preston vs. Postel, 300 Fed 134;

Wolley vs. Bishop, 180 Fed. 188;

12 CJS 200;

Neff vs. Schrader, 191 NW 466;

Combs vs. Hendricks, 238 SW 546;

Brown vs. Marty, 187 NW 181;

Bush vs. Abraham, 35 Pac. 1066;

Lesser vs. McGerry & Co., 8 Pac. 2d. 1058;

Carl vs. Eade, 253 Pac. 750;

Kinney vs. Wither, 295 Pac. 793;

Grant vs. McLaughlin, 217 Pac. 873;

Crane vs. Eddy, 61 NE 431; 85 ALR 284.

CONCLUSION

We append to this brief the careful considered opinion of the Hon. Chase Clark, which sustains appellee's contentions made in the District Court, and we doubt that we have here improved upon the analysis there made by him.

Upon reading all of the cases referred to and cited in appellants' brief. we honestly must admit that we have no quarrel with the references to the duties and obligations of an agent to his principal. However, we feel that they have no specific application to the case at bar. It is our position, which position met with the approval of the trial judge, that appellee dealt openly, fairly and above board with his principals, the appellants, throughout all of the transactions. Because the appellants, after they had entered into the Randall agreements, found the pur-

chaser not satisfactory to them, and thus released voluntarily the Randalls from the contract obligations, should not in any way under the law or under the facts prejudice the recovery by appellee of his full earned commission. It is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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IN THE

United States District Court

District of Idaho

Southern Division

J. HAROLD ABEGGLEN,
Plaintiff,

vs.

PERRY E. BURNHAM and
L. EARL BURNHAM,
Defendants.

No. 2674

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OPINION

June 14, 1950

CLARK: District Judge.

The Plaintiff alleges in his amended complaint that he is, and was at all times mentioned in the complaint, a real estate broker licensed under the laws of the State of Idaho, with his principal place of business at Hailey, Idaho; that on April 29, 1948, the defendants listed with him a certain ranch, together with certain personal property thereon, which ranch and personal property are described in the contract appointing plaintiff to act as agent of defendants in procuring a buyer. This "listing" contract or contract of employment was in writing and is set out in full in the complaint. It provides for a commission of 5 per cent of the sale price of $140,000.00, less $1,000.00 or a total commission of $6000.00. On May 15, 1948, the contract was modified to provide that the commission as stated in the original contract dated April 29, 1948, would be paid as follows:

> "$2.000.00 when the first $25,000.00 is paid and $2,000.00 when the second $25,-000.00 is paid, and the remaining $2,000.00 when the full down payment of $70,000.00 is paid on the purchase price of this Cove Ranch, making a total of $6,000 Commission."

That while the contract was in effect the plaintiff procured purchasers who were able, ready and willing to purchase the listed property; that defendants entered into an agreement on May 11, 1948, with these purchasers, which agreement was satisfactory

and agreeable to the defendants; and that threafter, on August 12, 1948, this agreement was modified by a new written agreeemnt between the same parties. The original agreement and the modified agreement are set out in full in the complaint.

Plaintiff alleges further that upon the execution and delivery of the agreement dated May 11, 1948, the purchasers entered into possession of the real and personal property concerned, did certain work on the premises, made certain improvements, paid all taxes due, paid water assesments, and in general operated the property in accordance with the contract of sale existing between them and the defendants; that certain payments were made by the purchaser to defendants on the purchase price and certain credits on the accounts were given by the defendants to the purchasers, all in the total amount of $31,983.93, these payment and credits being set out in detail in the complaint; and that said amount has been forfeited and paid or will be paid by the purchasers on account of the purchase price of the real and personal property; that hereafter and at the special instance and request of the defendants, and without the knowledge, consent or approval of the plaintiff, the defendants entered into an agreement with the purchasers whereby it was voluntarily and mutually agreed between the defendants and the purchasers that the contract of sale should be terminated and possession restored to the defendants. In other words, plaintiff alleges that the con-

tract of sale was cancelled without his knowledge or consent. Plaintiff further alleges that the defendants thereafter sold the property to some third person; that no part of plaintiff's commission of $6,000.00 has been paid, though demand has been made upon the defendants on each of them for the payment thereof; wherefor plaintiff prays that he have judgment against the defendants, and each of them in the amount of $6,000.00 with interest thereon at the rate of 6 per cent per annum from April 4, 1949, and for costs of suit.

In their answer to plaintiff's amended complaint, defendants make certain denials and certain admissions, but principally and substantially they admit that plaintiff was their agent in the purported sale of the property but allege they were wrongfully induced to sign the agreement making plaintiff their agent and they were wrongfully induced to sign the contract of sale, in that plaintiff made misrepresentations as to the ability of the purchasers to comply with the terms of the contract of sale. Specifically, defendants allege that plaintiff made misrepresentations in the following particulars: That on or about May 15, 1948, plaintiff represented to defendants that one of the purchasers, Oriel Randall, was the owner of a farm at Eden, Idaho, whereas the title to the farm was actually in the name of his deceased wife and the property was subject to a mortgage of approximately $5,000.00 and parts of the farm were being purchased under con-

tract upon which there was a large amount unpaid; that plaintiff at the same time represented to defendants that another of the purchasers, Carl H. Randall, was the owner of a farm at New Plymouth, Idaho, which plaintiff exhibited to defendants as Carl H. Randall's farm, whereas he was not the owner of the farm exhibited or of any farm whatsoever; that plaintiff at the same time represented to defendants that another of the purchasers, Edward Randall, was the owner of a farm at Parma, Idaho, whereas the property was in fact subject to a mortgage of approximately one-half of its value; that plaintiff represented such farms to be free of mortgage indebtedness and proposed that the defendants sell the property here concerned to the purchasers and take, as security for the payment of approximately one-half of the purchase price thereof, the negotiable promissory note of each of the three purchasers for the sum of $25,000.00 to be secured by a mortgage for the amount of the note on each of their respective farms; that defendants accepted the proposal because they believed, from the representations made by plaintiff, that the farms were free from indebtedness; that the purchasers agreed to execute and deliver mortgages on their farms; that they did not do so, although they went into possession of defendants' ranch and personal property immediately after signing the contract of sale. Defendants admit entering into the modified agreement, or contract of sale, on August 12, 1948, with

the purchasers; and admit the cancellation of the contract. They deny that any forfeitures were made by the purchasers and they allege that no profits were derived by the defendants from the transaction, and that on the contrary the defendants suffered damages by reason thereof.

Narrowed down, the issue in the case is this: Plaintiff claims his commission under his contract of employment, alleging that he procured bona fide purchasers and that a bona fide sale was made to these purchasers procured by him. Defendants admit that plaintiff was employed as their agent and that he procured purchasers, but allege that purported transaction was induced by material misrepresentations by the plaintiff, on which the defendants relied; that the representations were false and were known by plaintiff to be false or were made by the plaintiff in reckless disregard of the truth; that there was therefore no bona fide sale and the plaintiff did not earn a commission. The alleged misrepresentations related to the ability of the purchasers to furnish mortgages on the three farms as referred to earlier herein.

The evidence is conclusive that two of the purchasers, Oriel Randall and Edward Randall, did execute and deliver mortgages on their respective farms as agreed in the original contract of sale. These two mortgages are, in fact, still held by the defendants. It is also conclusive from the evidence

that by agreement dated August 12, 1948, the earlier agreement pertaining to the furnishing of mortgages by each of the three purchasers on their respective farms was modified by mutual agreement of the defendants and the purchasers to provide for certain other securities in lieu of the mortgage which, under the original agreement, Carl Randall was to have executed and delivered to the defendants. It cannot be doubted that by entering into this modified agreement the defendants acquiesced in the substitution of securities and waived any right they might have had to rescind the original contract of sale. In short, as late as the date of this modified agreement, August 12, 1948, defendants still regarded the Randall brothers as bona fide purchasers, "able, ready and willing" to buy the property. It must also be noted that at the time the contract of sale was cancelled by mutual agreement of the defendants and the purchasers, the purchasers were not in default on the contract in any respect, the only previous default having been waived by defendants as discussed above. It is clear from the evidence that the agreement to cancel the contract was entered into without the knowledge, consent or approval of the plaintiff.

There is some dispute as to how much was paid by the purchasers on the purchase price. Exhibits 14 and 15 show payments and credits totaling $22,-383.16; it would appear from other evidence to amount to well in excess of $25,000.00.

The pertinent facts are that plaintiff was engaged by defendants, under a contract in writing, to sell certain property; that he procured purchasers, an agreement was entered into and later modified; that the purchasers went into possession of the property immediately following execution of the original agreement; that the purchasers made substantial payments on the purchase price, the exact amount of which is subject to dispute; that subsequently, and while the purhasers were not in default on their contract to purchase, the contract was cancelled with the mutual consent of defendants and purchasers and without the knowledge, consent or approval of the plaintiff.

The question before the Court is the rights of a real estate broker to his commission under the state of facts existing here. The general rule is that after a contract between the principal and a customer produced by the broker has been concluded, its subsequent modification or cancellation does not defeat or affect the right of the broker to a commissi unless it is done at his request or with his consent or knowledge and acquiescence.

The Court is of the opinion that the plaintiff was free from misconduct in his dealings with the defendants, also if there was any misunderstanding the defendants acquiesced therein when they entered into the modified agreement with the purchasers after acquiring actual knowledge of the failure of

Carl Randall to deliver the mortgage on his farm, and any claims of misrepresentation were thereby waived, and that the case at bar falls within the general rule just stated. It is true that the contract of employment on which plaintiff relies provided for the payment of commissions pro-rata as the purchase price was paid and that $2000.00 of the commission was to have been paid when $25,000.00 was paid on the purchase price. If plaintiff's recovery were to be limited by this provision of the contract of employment, it would be of primary importance to determine exactly how much was actually paid in the form of cash and credits. However, the rule has been laid down that where a broker's contract with the owner provides for payment of commissions pro rata as the purchase price is paid, the broker is entitled to his entire commission upon cancellation of the owner's contract with the purchaser by mutual consent of the owner and purchaser when the contract is cancelled without any agreement with the broker, at least where the purchaser is not yet in default. Ratzlaff v. Trainor-Desmond Co., 183 Pac. 269. This rule is applicable to the case at bar, for the defendants have abandoned their contract of sale and have made it impossible to carry out the contract with the purchasers procured by the plaintill, The cancellation of the contract by mutual consent of the defendants and purchasers was no concern of the plaintiff. If he earned a commission at all, he earned it on the full price for which the prop-

erty was sold, and his commission could not be reduced by the subsequent transaction.

It is therefore immaterial as to what amounts have been paid or credited and are yet to be paid on the purchase price, except insofar as the payments and credits indicate the bona fide nature of the transaction and show that the purchasers were not in default at the time the contract was cancelled. Plaintiff is entitled to recover his full commission; interest will be allowed from date of judgment.

Counsel for Plaintiff will prepare findings of fact, conclusions of law and decree and serve copy on opposing counsel; submitting the original to the Court for approval.